Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses	)	WT Docket No. 12-4
Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses	)	

RCA – THE COMPETITIVE CARRIERS ASSOCIATION PETITION TO CONDITION OR OTHERWISE DENY TRANSACTIONS

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RCA – The Competitive Carriers Association ("RCA") hereby petitions the Federal Communications Commission ("FCC" or "Commission") either to place conditions on any approval of the subject applications or, in the alternative, to deny the applications. The applications arise out of a series of related transactions (the "Transactions") – one of which proposes to assign valuable wireless spectrum from a potential speculator and both of which propose to assign scarce spectrum to a potential warehouse. These Transactions must not be approved without a full examination of both the facts surrounding the intent of the assignors in acquiring the licenses at issue and the current spectrum utilization of the assignee, as well as the application of rigorous conditions, specific to the potential competitive harms that they would cause. Unconditional approval of the Transactions without appropriate conditions would significantly undermine the stated FCC goal of ensuring meaningful competition in the wireless industry. If Cellco Partnership d/b/a Verizon Wireless ("Verizon") is permitted to acquire the

spectrum currently held by SpectrumCo, LLC ("SpectrumCo") and Cox TMI Wireless, LLC ("Cox") (collectively, the "Applicants") without all of the conditions sought by RCA, the markets for mobile wireless services, wholesale inputs (such as voice and data roaming), special access and backhaul, spectrum on the secondary market, and content and wireless devices will be substantially and negatively impacted. In support of this Petition, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

RCA is an association representing more than 100 competitive wireless providers across the United States. Most of RCA's members individually serve fewer than 50,000 customers. RCA's role as the leading voice for competitive carriers on legal and policy issues gives it a unique perspective on the substantial harms that will accrue to competitive carriers if the Transactions are allowed to proceed without a searching factual inquiry and stringent conditions to mitigate their anti-competitive effects. As a result, RCA is a party in interest with standing to submit this Petition.[1]

The Commission once again finds itself at a crossroads for the wireless industry. As the Commission recognized in connection with the now-abandoned AT&T/T-Mobile transaction, the retail market for wireless services has become an imbalanced contest between the Twin Bells – the Verizon/AT&T duopoly – and the rest of the industry. While competitive carriers struggle to take on the Twin Bell duopoly with limited spectrum, financial resources, and scale and scope, Verizon is seeking to cement its position at the top by denying critical inputs to its competitors, such as by hoarding additional spectrum in its already well-stocked warehouse, leaving smaller spectrum-starved carriers to wither on the vine.

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[1] 47 C.F.R. § 1.939(a).

The Commission must not accept Verizon's untenable assertion that the Transactions do not merit close scrutiny because they involve "only" spectrum. Quite to the contrary, the Commission must conduct a robust review of the Transactions *precisely because* they involve spectrum – which is the lifeblood of the wireless industry. The Transactions come at a time when many carriers – Verizon being a notable exception – find themselves desperate for additional useable spectrum resources to meet surging consumer demand. Verizon already holds a commanding position with respect to usable spectrum under 1 GHz, and in spectrum that is currently best suited to deploy 4G LTE services in the near term. Verizon freely admits that its spectrum needs are met through at least 2015, but nonetheless seeks the Commission's blessing to hoard more valuable useable spectrum across the nation. These are not unassuming spectrum assignments as Verizon has claimed in its Applications; the Transactions instead raise significant competitive concerns, and must undergo a detailed review by the Commission.

The Commission also must investigate the substantial and material questions that are raised regarding whether SpectrumCo is a speculator intent upon trafficking in spectrum for profitable resale, rather than constructing and operating systems in the public interest. The Commission must take a close look at any spectrum transferred from a speculator to a warehouser. Comcast, for example, has been quite open about its true motives, which potentially violate the Commission's own rules, publicly stating that it "never really intended to build that spectrum."[2] This disregard for the scarce public tax-payer resource that has been entrusted to it is nothing new. Indeed, over the course of a nearly six-year period from license grant until today, leading members of SpectrumCo have made repeated statements indicating their lack of

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[2] Josh Wein, "Comcast Never Planned to Build Out AWS Spectrum," Communications Daily, 8 (Jan 6. 2012) ("*Comcast Article*").

interest in actually putting this valuable AWS spectrum to beneficial use serving consumers.[3] To ensure the integrity of the Commission's spectrum allocation processes, the Commission must thoroughly examine whether SpectrumCo acted as a speculator in violation of the Commission's rules against spectrum trafficking.[4]

Further, the Commission must investigate the extent to which Verizon is warehousing spectrum, which has serious anti-competitive effects. It is RCA's understanding that Verizon already has as much as 44 MHz of prime, unused spectrum in many markets. And, if the Transactions are permitted to proceed unaltered, Verizon will have up to 72 MHz of fallow spectrum in several of the top 100 markets. These vast swaths of unused spectrum, coupled with the lack of any definitive plans to use its existing or proposed new spectrum, prevent the Commission from finding that a grant of the Applications will serve the public interest.

In assessing the Transactions, the Commission must not limit its review to a market-by-market spectrum screen analysis, lest its granular approach mask the substantial potential anti-competitive harms that may result at the national level. The Commission previously has recognized that, where proposed transactions have national characteristics such as the nationwide spectrum acquisition at issue here, they "warrant a competitive analysis on the national level."[5] Consequently, the Commission can and should look outside of its traditional local spectrum screen analysis and view the Transactions on a national basis. When viewed in the aggregate, the anti-competitive harms become readily apparent. While the Verizon/AT&T duopoly already

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[3] *See infra*, Section III.A.

[4] 47 C.F.R. § 1.948(i)(1).

[5] *Application of AT&T Inc. and Qualcomm Incorporated For Consent To Assign Licenses and Authorizations*, Order, WT Docket No. 11-18, FCC 11-188, ¶ 32 (rel. Dec. 22, 2011) ("*AT&T/Qualcomm Order*").

dominates the most important input markets, a grant of the Transactions without significant conditions, which must include spectrum divestitures where Verizon would warehouse significant amounts of spectrum, will further fortify their supremacy with respect to spectrum availability, voice and data roaming, special access and backhaul, and equipment availability. Without reasonable access to these essential inputs, competitive carriers will be unable to provide meaningful competition in the national marketplace, and the Commission must attach conditions to remedy each of these potential harms. Importantly, the Transactions will also remove four separate potential competitors, which will further untether the limited competitive constraints on the Twin Bells in each of these input markets..

In addition to viewing the Transactions on a national level, the Commission should be actively considering alternatives to its current spectrum screen, which, in its current form, is broken. Any screen that the Commission uses must account for the substantial differences between types of useable spectrum – and in particular consider the significantly increased value of spectrum under 1 GHz and the lesser value of spectrum above 2.5 GHz. In the alternative, the Commission must revise the screen to more accurately reflect the current availability of wireless spectrum – particularly with respect to useable SMR spectrum and the 700 MHz D Block.

It is the Commission's duty to determine whether or not the Transactions are in the public interest. While the Applicants may suggest otherwise, the Transactions raise significant questions regarding speculation and warehouseing, the undue concentration of spectrum in Verizon, and the ability of Verizon to wield that spectrum as a weapon to the detriment of competition in the industry. In order to approve this nationwide transfer of spectrum, the Commission must conduct an exhaustive investigation and attach stringent conditions to the Transactions to counteract any potential anti-competitive harms that may result.

II. THE COMMISSION MUST CLOSELY SCRUTINIZE THESE TRANSACTIONS TO PREVENT SIGNIFICANT POTENTIAL COMPETITIVE HARMS

Verizon inexplicably suggests that the "Commission's review of [these] application[s]... should be limited"[6] because the "transaction[s] involve[] only assignments of spectrum."[7] In effect, the Applicants are asking the Commission to rubber stamp these significant, market-altering Transactions and the accompanying joint agreements between Verizon and the Cable Companies.[8] The proposition that these material spectrum transfers – which have a clear impact on the *nationwide wireless markets* – do not require a robust public interest analysis because they only involve the transfer of spectrum reveals a remarkable disconnect between Verizon's view of the world and reality. The aggregation of spectrum – the lifeblood of wireless services – is perhaps the *most* important consideration for the Commission when reviewing any proposed transaction. A searching inquiry is particularly important when the acquirer, Verizon, is one of the two nationwide carriers that enjoys a virtual duopoly in the wireless market. As the Commission has recognized, "[a]ccess to spectrum is a precondition to the provision of wireless service. In fact, Chairman Genachowski recently highlighted the importance of access to spectrum, calling it "invisible infrastructure."[9] Ensuring that sufficient spectrum is available for incumbent licensees, *as well as for entities that need spectrum to enter the market*, is critical to

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[6] Verizon-SpectrumCo application, ULS File No. 0004993617 Exhibit 1, at 4 ("SpectrumCo PI Statement").

[7] SpectrumCo PI Statement at 1.

[8] Consisting of Time Warner Cable ("TWC"), Comcast and Bright House Networks ("BHN") and Cox (collectively, the "Cable Companies").

[9] Statement of Julius Genachowski at the Silicon Flatirons Conference on Feb. 13, 2012, *available at* http://www.youtube.com/watch?v=Pyryxg12hAo.

promoting competition, investment and innovation."[10] As part of its competitive analysis, the Commission considers the important "input market for spectrum available for the provision of mobile telephony/broadband services."[11] This examination of spectrum is particularly important right now. Presently, that market is stagnant at best, with little or no opportunities for competitive providers or new entrants to gain access to spectrum suitable for the provision of wireless broadband. Indeed, the Commission must ignore the Applicants' cavalier attitude towards these significant and potentially harmful Transactions, and conduct a searching factual inquiry and a through and exhaustive review of the anti-competitive harms that would result.

As President Obama has written, and Verizon has acknowledged, America faces a potential spectrum problem that threatens to stifle wireless growth and innovation.[12] Sufficient spectrum capacity is necessary to support the explosion of consumer data use that is happening *right now*. Verizon properly recognizes this circumstance, noting that "data usage on networks more than doubled in 2010," and references a recent CTIA study that "again shows a doubling of consumers' data usage" for 2011.[13] Yet, in the face of these indisputable facts, Verizon somehow posits that the transfer of 20 MHz of prime usable spectrum, which it currently does

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[10] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fourteenth Report, 25 FCC Rcd 11407, ¶ 251 (2010) (emphasis added) ("*Fourteenth Report*").

[11] *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, Memorandum Opinion and Order, 24 FCC Rcd 13915, ¶ 34 (2009) ("*AT&T-Centennial Order*").

[12] President Barack Obama, "Unleashing the Wireless Broadband Revolution," Presidential Memorandum (June 28, 2010), *available at* http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution; SpectrumCo PI Statement at 6.

[13] SpectrumCo PI Statement at 7.

not have any plans to put to use in the near term,[14] is no big deal. To the contrary, these Transactions are a big deal to competitive carriers – and there are perhaps more to these Transactions than meets the eye, as the Applicants continue to hide the ball regarding the new cooperative relationships formed by the joint agreements among and between companies who otherwise would be staunch competitors.

A. The Transactions Will Exacerbate Verizon And AT&T's Spectrum Dominance And Cement A Wireless Duopoly

Over the last five-plus years, the wireless industry has consolidated at an alarmingly rapid rate. As a result, competitive carriers face ever-increasing obstacles to competing with the "Big Two" carriers – Verizon and AT&T (the "Twin Bells"). The dominance of the Twin Bells in the marketplace is visible by nearly any measure, including subscriber counts, industry EBITDA, total revenues, quantity of prime spectrum and value of spectrum. For example, these two mega-carriers enjoy a duopoly position in the wireless industry, sharing a combined *90 percent* of industry EBITDA, confirming that "the competitive landscape has continued to deteriorate in the last several years."[15] The wireless industry has passed the tipping point in terms of the national concentration of power, and the traditional market-by-market spectrum screen analysis fails to properly assess the actual competitive imbalance. The Commission must recognize that the dominant Verizon/AT&T duopoly – and their control of the lion's share of prime broadband spectrum – makes it increasingly difficult for new entrants or other smaller carriers to provide effective competition in the industry. Spectrum is the lifeblood of wireless competition, and

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[14] As discussed below, it is particularly troubling that Verizon seeks to stockpile spectrum for a theoretical rainy day more than three years away, while competitive carriers desperately need additional spectrum resources immediately.

[15] Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, (Aug. 9, 2010), attached to *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC, filed in RM-11592 (Aug. 10, 2010).

each additional MHz that Verizon and AT&T acquire permits them to exert greater control over the market, making it increasingly difficult for competitive carriers to gain access to necessary spectrum resources, not to mention other critical inputs.

At present, Verizon is sitting atop its massive spectrum warehouse, effectively foreclosing the ability of competitive carriers to acquire access to spectrum on the secondary markets. Verizon also has a dreadful history of stonewalling and unreasonable behavior with respect to roaming agreements, effectively foreclosing this alternative access to spectrum in new markets.[16] The market power held by the Twin Bell duopoly enables them to foist roaming rates on others that are well above those that would prevail in a functioning competitive market. Creating further uncertainty for RCA members, Verizon has appealed the *Data Roaming Order* thus clearly signaling that it does not want to, and will not, offer data roaming on commercially reasonable terms.

The consolidated state of the industry is an important consideration for the Commission when analyzing the Transactions. The Commission must take a hard look at what a post-Transactions world looks like and ensure that it does not wind up overseeing an industry completely dominated by the Twin Bells, with competitive carriers left to wither on the vine. As discussed below,[17] competition is not only harmed by Verizon cementing its duopoly position, but also is harmed by the loss of potential new competitors. Indeed, the exit of the Cable

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[16] *Ex Parte* Letter from Rebecca Murphy Thompson, General Counsel, Rural Cellular Association and Caressa D. Bennet, General Counsel, Rural Telecommunications Group to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-265 (filed Nov. 12, 2010) (recounting a history of stonewalling behavior experienced by RCA and RTG members at the hands of Verizon and AT&T).

[17] *See infra*, Section IV.

Companies from the wireless marketplace removes four separate potential competitors in both the retail and wholesale national wireless marketplaces.

B. The Transactions Would Result In The Twin Bells Having An Unprecedented Concentration Of Spectrum Resources

By any measure, the Transactions will result in an unprecedented concentration of spectrum resources in two carriers. While AT&T's commanding spectrum position has been well-documented by the Commission,[18] the Transactions would result in an even greater concentration of spectrum in the hands of Verizon. This dominance is evident from any number of viewpoints: (i) average spectrum holdings on a national basis; (ii) national MHz*POPs; (iii) spectrum holdings in top markets; (iv) spectrum under 1 GHz; (v) spectrum suitable for 4G LTE services; and (vi) book value of spectrum.

i. The Transactions Would Exacerbate Verizon's Dominant Spectrum Position, Further Cementing A Wireless Duopoly

It is no secret that, "[a]t the national level," Verizon and AT&T already "have the most substantial spectrum holdings."[19] With Verizon holding an average of 88 MHz nationally, and AT&T holding an average of 94 MHz nationally,[20] these two carriers dwarf the wireless broadband spectrum holdings of all other carriers *combined.* The Twin Bells hold dominant spectrum positions using the Commission's MHz*POPs metric – with Verizon holding licenses covering approximately 22 percent, and AT&T covering approximately 21 percent, of the total

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[18] *See generally*, Staff Analysis appended to *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, Order, WT Docket No. 11-65, DA 11-1955 (rel. Nov. 29, 2011) ("*AT&T/T-Mobile Staff Analysis*").

[19] *AT&T-Qualcomm Order* ¶ 45.

[20] *See* Sprint Nextel Corporation Petition to Deny, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer of Control Licenses and Authorizations*, WT Docket No. 11-65 (filed May 31, 2011).

MHz*POPs available for use in the provision of wireless broadband.[21] Allowing these Transactions to proceed would result in a remarkable *23 percent* increase in Verizon's proportion of total national MHz*POPs, resulting in total coverage of approximately 27 percent of the national MHz*POPs (from 22 to 27 percent). This is a matter of serious concern in light of the Commission's guidelines for ensuring effective competition in the nationwide wireless broadband market, as discussed in the *AT&T/Qualcomm* transaction. In allowing AT&T to acquire Qualcomm's nationwide 700 MHz spectrum, the Commission concluded that the "implementation of [that] transaction would still leave available for competitors at the national level more than three quarters of the spectrum suitable for mobile voice or broadband."[22] However, the acquisition of SpectrumCo and Cox would allow Verizon to co-opt more than one fourth of the available national MHz*POPs (thus leaving less than three quarters available for competitors). And, even worse, when combined with AT&T's holdings, the two carriers would control nearly half of the national MHz*POPs.

The Twin Bells also dominate spectrum holdings in the top 100 markets, and the Transactions will only further entrench Verizon in these major markets. Verizon and AT&T tip the scales with 91 MHz and 100 MHz, respectively, in the top 100 markets, leaving their next closest competitor, T-Mobile with 53 MHz, a distant blur in the rear-view mirror.[23] In addition,

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[21] *AT&T-Qualcomm Order* ¶ 45. T-Mobile, the carrier holding the next largest amount of spectrum, has under 15 percent of the national MHz*POPs. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* Fifteenth Report, 26 FCC Rcd 9664, ¶ 288, Chart 38 (2011) ("*Fifteenth Report*").

[22] *AT&T-Qualcomm Order* ¶ 45.

[23] J.P. Morgan, *Wireless Services: Overview of Carrier Spectrum Holdings*, Mar. 30, 2011, at 3, *available at* https://mm.jpmorgan.com/stp/t/c.do?i=62A4EB32&u=a_p*d_569842.pdf*h_-ifi22f3 ("*J.P. Morgan Spectrum Study*").

competitors like MetroPCS and Leap provide service in these markets over a mere *one-fifth* of the spectrum available to Verizon and AT&T, and the spectrum shortage is even more severe for many small rural carriers.[24] With no more usable spectrum on the horizon in the near term (even with the recent spectrum legislation), and with the Twin Bells' purchasing power chilling the secondary markets, this is simply an untenable situation. The Commission must not allow Verizon, which already commands a vast spectrum portfolio, to further fortify its spectrum dominance at the expense of competition.

ii. The Transactions Would Result In Verizon Dominating The Market For Prime Spectrum Resources

The alarming concentration of spectrum discussed above does not fully illustrate the overwhelming dominance Verizon would obtain if the Transactions are approved. The sheer magnitude of Verizon's warehouse of the aggregate available national spectrum is made all the more serious because Verizon's holdings largely consist of the most valuable types of spectrum. The Commission already has indicated that it is "prudent to inquire about the potential impact of [the] aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis."[25] And, the Commission has properly recognized the potential need for distinguishing among the quality of various bands of spectrum for the purposes of competitive analysis.[26] When the amount of prime spectrum held by Verizon is taken into account, its spectrum dominance is even more glaring.

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[24] *Id.* Indeed, in a number of these metropolitan areas, one of the other carriers may be second or third to the Twin Bells with substantially less spectrum.

[25] *AT&T/Qualcomm Order* ¶ 49.

[26] *AT&T/T-Mobile Staff Analysis* ¶ 45, n.136.

The Commission has recently recognized – as it should – the "general consensus that the more favorable propagation characteristics of lower frequency spectrum allow for better coverage across larger geographic areas and inside buildings."[27] As a result, "[t]wo licensees may hold equal quantities of bandwidth but nevertheless hold very different spectrum assets."[28] For example, "[i]t is well established that lower frequency bands – such as the 700 MHz and Cellular bands – possess more favorable intrinsic spectrum propagation characteristics than spectrum in higher bands. As a result, 'low-band' spectrum can provide superior coverage over larger geographic areas, through adverse climates and terrain, and inside buildings and vehicles."[29] Notably, the FCC is not the only governmental body to have reached this conclusion. During "consideration of mobile wireless competition issues, the DOJ has noted the differences between the use of lower and higher frequency bands," and, "[a]s lower frequency spectrum is becoming available for mobile services in other countries, some regulators have adopted or are considering policies intended to help facilitate the wider distribution of this newly available spectrum."[30] With this as background, the Commission must take note of Verizon's already-dominant position in prime spectrum bands. In the top 100 Markets, Verizon holds 58 MHz of "beachfront" spectrum below 1 GHz, with AT&T a close second at 54 MHz.[31] Compared with the 12 MHz of SMR spectrum held by Sprint, the 12 MHz of 700 MHz Lower A

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[27] *Fifteenth Report* ¶ 289.

[28] *Id.* at ¶ 290.

[29] *Id.* at ¶ 292.

[30] *Id.*

[31] *J.P. Morgan Spectrum Study* 3.

Block spectrum held by MetroPCS in a single market,[32] and the 0 MHz held by Leap, the contrast could not be more stark between the spectrum "haves" and the "have-nots."

So, spectrum holdings below 1 GHz are an important consideration. An equally important consideration is the dominance by Verizon in spectrum that is best suited to provide 4G LTE services. Not all spectrum bands are available for LTE deployment at present. In fact, LTE so far has only been commercially deployed on the AWS band by MetroPCS and AT&T and on the 700 MHz band by Verizon. And, Verizon already has a commanding lead over other carriers (including AT&T) in these prime 4G LTE bands, holding an average of 62 MHz of spectrum currently available for 4G LTE deployment in the top 100 markets – which outpaces its closest competitor, AT&T, by 46 percent.[33] If the Transactions are permitted to proceed, Verizon would hold 56 percent more 4G LTE-ready spectrum in the top 10 markets than would AT&T,[34] to say nothing of its staggering advantage over the 4G LTE spectrum positions of small, rural and mid-tier carriers. What's worse, rural and regional carriers are prohibited from using their 700 MHz A Block spectrum as a result of the lack of interoperability caused by the large national carriers locking out their competitors from the 4G LTE market. Given the critical importance of 4G LTE services to consumers – and of carriers' ability to compete for consumers – the Commission must take a hard look at whether one carrier should be permitted to further cement its dominant position in these important spectrum bands, particularly when the acquiring

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[32] MetroPCS holds a single 700 MHz A Block license covering Boston and other surrounding ancillary markets.

[33] Elizabeth Woyke, "Verizon To Enter 2012 As King Of 'New Spectrum Landscape'" Forbes.com (Dec. 20, 2011), *available at* http://www.forbes.com/sites/elizabethwoyke/2011/12/20/verizon-to-enter-2012-as-king-of-new-spectrum-landscape/.

[34] *Id.*

carrier has demonstrated that its spectrum needs are met in the near term and would merely be putting this spectrum into its warehouse. Without the necessary spectrum in a 4G LTE world, carriers outside of the Twin Bells will be unable to compete for consumers on anything resembling a level playing field. As discussed in detail below, the Commission must condition the Transactions to prevent Verizon from extending its 3G dominance into an insurmountable position in the 4G LTE world.

III. ASSIGNMENT OF SIGNIFICANT NATIONWIDE SPECTRUM RESOURCES FROM A POTENTIAL SPECULATOR TO A WAREHOUSER IS CONTRARY TO THE PUBLIC INTEREST

In addition to the substantial and material anti-competitive concerns regarding the nationwide spectrum aggregation resulting from the Transactions, the Commission also must examine whether the Cable Companies, excluding Cox who briefly operated a facilities-based wireless network,[35] (the "Non-Operators") acted as mere spectrum speculators who sought only to turn a profit by exploiting a public resource. While the Non-Operators claim that they undertook actions to put the spectrum to use, they never undertook serious efforts to build and operate a facilities-based wireless network, instead choosing to treat valuable spectrum – desperately needed immediately by operating entities – as an investment vehicle. And, perhaps most disturbing, the Transactions propose to assign this prime resource from the speculating Non-Operators to Verizon, an admitted spectrum warehouser. With an immediate and critical demand for spectrum throughout the universe of competitive carriers, the Commission must not allow such an assignment to occur without stringent conditions.

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[35] Mike Robuck, "Cox to shut down wireless service," CED Magazine (Nov. 16, 2011), *available at* http://www.cedmagazine.com/news/2011/11/cox-to-shut-down-wireless-service.

A. The Commission Must Undertake A Robust Inquiry Into Whether The Non-Operators Acted As Spectrum Speculators

The Commission has long recognized the public interest harms of spectrum trafficking. Indeed, the Non-Operators' Licenses are specifically subject to a prohibition on trafficking, which the Commission defines as

> obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public or for the licensee's own private use.[36]

Based on public comments from Comcast in particular, it is quite clear that there was no true intent for any of the Non-Operators to become facilities-based competitors. Shortly after purchasing the Licenses in 2006, Comcast made its wireless intentions, or, more accurately, lack of intentions, quite apparent. A Merrill Lynch analyst reported that Comcast "[made] it clear at our annual media conference last week that the company has no intention of 'being the fifth cellular operator,'" and that "it did not anticipate embarking on any substantive buildout of the spectrum in the near term and that it was willing to let the asset lie fallow for some years to come."[37] In subsequent years Comcast repeatedly indicated that it had no real intention of ever using the Licenses to provide competition in the wireless market:

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[36] 47 C.F.R. § 1.948(i)(1).

[37] Heather Forsgren Weaver, "Leap, MetroPCS break into major markets with AWS spectrum," RCR Wireless (Sep. 25, 2006), *available at* http://www.rcrwireless.com/article/20060925/sub/leap-metropcs-break-into-major-markets-with-aws-spectrum/. This comment is telling because it demonstrates that the Non-Operators never intended to build out this spectrum. Rather, it was a purely financial play for them.

- In 2008, Comcast CEO Brian Roberts said, in response to a question about Comcast's plans for its AWS spectrum, that "the strategy has not changed and that we're studying what's the best way to utilize that, ***if at all***."[38]
- In 2009, Comcast CFO Michael Angelakis stated that Comcast "[didn't] want to be the seventh competitor in a market that we think is mature from the voice side. And it's a huge economic investment, which we're uncomfortable there's a real return for."[39]
- In 2010, Angelakis stated that Comcast "[didn't] need to own the [wireless] network" and "[didn't] actually want to operate the [wireless] network."[40]
- In 2011, Angelakis again reiterated Comcast's lack of interest in actually providing service over the Licenses, stating that Comcast had "no desire to own a wireless network" and had "no desire to write large checks" to construct such a network.[41]

Perhaps most disturbing, when asked what the Transactions meant for Comcast's wireless strategy, Angelakis plainly stated that "[Comcast] never really intended to build that spectrum."[42] Perhaps having let too much of the truth slip out, Comcast has attempted to back away from

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[38] Comcast Corporation Q4 2007 Earnings Conference Call Transcript (Feb. 14, 2008) (emphasis added), *available at* http://seekingalpha.com/article/64684-comcast-corporation-q4-2007-earnings-call-transcript.

[39] Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sept. 16, 2009).

[40] Statement of Michael J. Angelakis, Comcast Corporation, Barclays Capital Investor Conference, 9 (May 26. 2010).

[41] Statement of Michael J. Angelakis, Comcast Corporation, Goldman Sachs Communacopia Conference, 5 (Sep. 20, 2011).

[42] *Comcast Article* 8.

these comments. However, the record is clear that Comcast's attitude towards this valuable public tax-payer resource was the same in 2006 as it is in 2012: no interest or intent in actually putting the Licenses to beneficial use. The Non-Operators appear to view the SpectrumCo licenses as just another investment, entirely ignoring their obligation to serve the public interest.[43]

The Commission's Wireless Bureau was rightly troubled by Comcast's latest admission, with an official noting that "at the foundation of our rules, especially our auction rules, is the integrity of the bidders and the integrity of the process."[44] The Bureau official also noted that "carriers like T-Mobile and MetroPCS are actively building out the licenses they bought in the AWS auction while the SpectrumCo spectrum, which gave the consortium almost a national footprint, has been lying fallow."[45]

In the SpectrumCo Public Interest Statement ("SpectrumCo PI Statement"), SpectrumCo admits that the reason they have not been interested in putting the Licenses to use is that "they cannot justify undertaking the substantial costs and risks involved in building a standalone, facilities based wireless network."[46] However, the substantial cost of building a wireless network is nothing unexpected or new. SpectrumCo obviously knew at the time of purchase that

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[43] Statement of Commissioner Michael J. Copps *Re: Service Rules for the 698-746, 747-762 and 777-792 Bands; Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band; Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules*, Report and Order and FNPRM, 22 FCC Rcd 8064, 8172 (2007) ("A license to use the peoples airwaves is a public trust – and we must not countenance . . . unreasonable delay in putting this spectrum to work.").

[44] Howard Buskirk, "Wireless Bureau to Probe Comcast CFO Statements on AWS Licenses," Communications Daily, 1 (Jan. 19, 2012). The same observation can be made of Verizon, which holds 20 MHz of AWS spectrum east of the Mississippi. To RCA's knowledge, Verizon has not put any of this AWS spectrum to use.

[45] *Id.*

[46] SpectrumCo PI Statement at 17.

building and operating a network would be a substantial investment. The Non-Operators' public statements and inaction therefore create a substantial and material question regarding whether the Licenses were purchased for "the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunication services to the public."[47] While Comcast has feebly attempted to backtrack from its comments – despite having sounded a consistent refrain for nearly six years – the FCC must at least investigate at a hearing these conflicting comments as material questions of fact. Approving the Transactions would reward SpectrumCo with a significant profit for simply sitting on a valuable public tax-payer resource. Indeed, SpectrumCo paid $2.4 billion for the Licenses that are now being sold for a combined $3.9 billion –*$1.5 billion in profit*, plus the value of the resale agreements, which have substantial value in and of themselves. With spectrum access challenges impacting carriers nationwide, SpectrumCo should not benefit from its gross inaction with a billion-dollar windfall, while the industry watches valuable spectrum be assigned from a speculator to a warehouser. Moreover, the $1.5 billion profit is money received for nothing more than allowing a *public tax-payer resource* to go to waste over a period of six years. It offends the public interest to allow this windfall to accrue to the Non-Operators.

B. The Commission Must Investigate The Extent To Which Verizon Has Been Warehousing Spectrum

The Communications Act of 1934, as amended (the "Act"),[48] places an affirmative obligation on the Commission "to prevent stockpiling or warehousing of spectrum by licensees or permitees."[49] A substantial question of fact is raised as to whether a grant of the subject

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[47] 47 C.F.R. § 1.948(i)(1).

[48] 47 U.S.C. § 151 *et. seq.*

[49] 47 U.S.C. § 309(i)(4)(B).

Transactions would violate this core public interest principle, particularly in light of the severe shortage of available broadband wireless spectrum that is plaguing many carriers in the industry.

Both the Commission and many carriers have referenced the spectrum challenges facing the wireless industry. Nonetheless, Verizon continues to trumpet its strong spectrum position, noting that it is not in need of spectrum in the immediate or near term, nor is it in danger of failing to meet foreseeable capacity demands on its network.[50] Indeed, in the SpectrumCo PI Statement, Verizon openly admits that it "has sufficient spectrum to meet its immediate needs, and generally to meet increased demands until 2015."[51] Allowing Verizon to add to the stockpile of spectrum in its warehouse would be contrary to the public interest. The Commission has a "unique responsibility to ensure that spectrum is allocated in a matter that promotes actual competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace."[52] The Commission must be mindful of this critical goal and ensure that it does not permit Verizon to warehouse spectrum in anti-competitive amounts that result in damage to the industry. This is especially true when the industry is starved for spectrum and Verizon may be engaging in the Transactions for anti-competitive reasons.

Verizon has no near-term need for additional spectrum because it is not using large portions of the spectrum that it already has. For example, Verizon already possesses 20 MHz AWS licenses covering nearly half the country. Yet, it is RCA's understanding that Verizon

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[50] Verizon previously indicated that it currently has strong spectrum holdings and that any spectrum shortage it would face in the absence of new allocations "is five to ten years down the road." Rich Karpinski, *TIA 2011: Genachowski, Hutchison Push Hard on Spectrum*, TIA2011CONNECTED (May 20, 2011), *available at*: http://tia2011connected.com/stories/tia-2011-genachowski-hutchison-push-hard-on-spectrum-0520/.

[51] SpectrumCo PI Statement at 13.

[52] *AT&T/Qualcomm Order* ¶ 30.

currently does not serve customers over the AWS spectrum that it already owns. RCA also understands that Verizon is not providing public service over the numerous 700 MHz A and B block licenses that it possesses.[53] There also is additional spectrum in other bands, particularly in rural areas, that Verizon is not using. It is also not clear how much Cellular and PCS spectrum Verizon currently uses. Thus, even without considering the substantial additional spectrum Verizon seeks to acquire in the proposed Transactions, Verizon *already* possesses at least 12 MHz of fallow spectrum on a nearly-national basis, with over 32 MHz in the eastern half of the United States, and in many cases as much as 44 MHz of dormant spectrum. Compare this with many competitive carriers, who offer service in major metropolitan areas with as little as 10 MHz of spectrum *total*[54] and are in need of additional spectrum.[55]

Now, Verizon seeks to further stock its spectrum warehouse via the proposed Transactions. If the Transactions are permitted to proceed, Verizon will have stockpiled 40 MHz of completely unused AWS and 700 MHz spectrum in most top 100 markets – and up to as much as 72 MHz in several of them.[56] The public interest would not be served by permitting Verizon to hoard even more spectrum – that it has no intention of using in the near term – while competitive carriers are denied access to this important input. To confirm whether Verizon is indeed warehousing spectrum rather than using it to provide service to customers, the

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[53] Verizon holds 20 MHz AWS licenses effectively covering the eastern half of the United States, as well as 12-24 MHz of 700 MHz A and B Block spectrum nearly nationwide.

[54] For example, RCA member MetroPCS provides service in the Philadelphia, PA market using only 10 MHz of AWS spectrum.

[55] Indeed, at least one RCA member, MetroPCS, has publicly stated that it does not currently offer services over certain devices – such as laptops and tablets – as a result of this lack of spectrum.

[56] For the purposes of this aggregation analysis, RCA has included the pending Leap Wireless and Savary Island applications (ULS File Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598).

Commission must require Verizon to provide specific details on a market-by-market, band-by-band basis of what spectrum it is currently using. Only then can the Commission make an appropriate determination as to whether it is in the public interest to assign Verizon the SpectrumCo and Cox spectrum. As noted above, the Commission has a responsibility to ensure that spectrum, as a public tax-payer resource, is allocated and utilized in a fair manner. An exhaustive analysis of Verizon's spectrum use – or non-use – would allow the Commission the critical data that it needs to make this determination.[57]

Verizon also has offered no concrete plans for the use of the spectrum it proposes to acquire in this latest spectrum grab. In contrast, the Commission found AT&T to have offered an appropriately concrete buildout plan in the *AT&T/Qualcomm Order*. In that proceeding, RCA noted its concerns regarding possible spectrum warehousing. The Commission did not dismiss these concerns, but rather cited AT&T's concrete plan for using the Qualcomm spectrum to support and enhance its ability to provide mobile broadband services over its LTE network, with services over the band commencing as early as 2014.[58] Just as the Commission is charged by statute to deter warehousing of spectrum, the Act also obligates the FCC to "promote . . . rapid deployment of new technologies and services."[59] The Applications fall far short of enabling the Commission to meet this standard. Verizon has only offered vague suggestions that the

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[57] RCA reserves the right to file further comments when this important missing information is supplied.

[58] *AT&T/Qualcomm Order* ¶ 89.

[59] 47 U.S.C. § 309(j)(4)(B).

spectrum might be needed for "projected future demand"[60] sometime around 2015 – and perhaps not until 2019.[61]

Spectrum warehousing should be of the utmost concern to the Commission. In the meantime, as Verizon sits atop a massive spectrum stockpile, it will take far longer than anticipated in the National Broadband Plan for the Commission to identify and deliver new broadband spectrum resources to the wireless market for auction, even now that spectrum legislation has passed. Indeed, industry analysts have already recognized that "[w]ireless data growth has made spectrum a competitive weapon."[62] With Verizon already occupying a dominant position with respect to spectrum inputs, and in particular with respect to 4G LTE spectrum inputs, the Commission must not allow Verizon to turn a public tax-payer resource into a "competitive weapon" with which it can slay competitive carriers.

C. Allowing The Assignment Of Nationwide Spectrum For Medium-To-Long-Term Uses With a Looming Spectrum Crunch Is Contrary To The Public Interest

Carriers, the Commission and industry observers have all reached a similar and inexorable conclusion: wireless providers must have access to spectrum in order to satisfy consumer demand for wireless services. However, at present the unused reservoir of useable, available spectrum is effectively dry. Indeed, along with the 2 GHz MSS spectrum,[63] the Cable Companies' 20 MHz of nationwide AWS spectrum represents one of the last unconstructed,

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[60] SpectrumCo PI Statement at 13.

[61] *Id.* at 14 (suggesting that its longer term spectrum needs might not arise for as long as "7 years").

[62] John C. Hodulik, "The New Spectrum Landscape," 1, UBS Investment Research, Wireless Telecommunications (Dec. 19, 2011).

[63] The spectrum licenses held by bankrupt operators TerreStar and New DBSD currently are the subject of pending applications to transfer control to DISH.